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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 893

STATE OF MINNESOTA EX REL. ARTHUR B. KONS
Petitioner

VS.

RALPH H. TAHASH, WARDEN MINNESOTA STATE PRISION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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RALPH H. TAHASH, WARDEN MINNESOTA STATE PRISION
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Arthur B. Kons, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota which was entered on October 4, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported at 161 N. W. 2d 826, and is set forth in our appendix, pp. A-4 - A-13.

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C.*, s. 1257 (3). The final judgment of the Minnesota Supreme Court affirming the Habeas Court's order dismis-

sing and discharging the Writ of Habeas Corpus was entered on October 4, 1968.

QUESTIONS PRESENTED

1. Did Minnesota accord the accused his right to the assistance of counsel within the meaning of the U. S. Constitution (murder second degree) where, the first time accused's request for counsel was honored occurred at the time of his arraignment; where, while the court remained on the bench and without recess, the court appointed counsel conferred with accused for three to four minutes in the courtroom; where, court appointed counsel immediately thereafter entered a plea of guilty on behalf of the accused; and where, with no questioning concerning the facts of the alleged charge, the accused was sentenced to life imprisonment?

2. Did Minnesota violate Petitioner's constitutional right to assistance of counsel in a Habeas Corpus case where it stated:

> "Unless defendant is denied a constitutional right which is prejudicial *and casts doubt on his guilt or innocence,* procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice resulted"? (Emphasis ours.)

CONSTITUTIONAL PROVISIONS

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 13, 1941, petitioner was indicted by the grand jury of Goodhue County, Minnesota for murder in the second degree. On said date, he was sentenced to life imprisonment and has been in the Minnesota State Penitentiary located at Stillwater, Minnesota up to the present time.

A petition for Writ of Habeas Corpus was filed September 15, 1964. A first evidentiary hearing was had in Washington County District Court on March 19, 1965 and a second evidentiary hearing was held on April 12, 1966. On March 10, 1967 an order was entered dismissing petitioner's writ and an appeal was taken to the Minnesota Supreme Court on April 3, 1967. The case on appeal was orally argued before the Minnesota Supreme Court on

April 4, 1968. Final judgment of the Minnesota Supreme Court was entered Oct. 4, 1968 affirming the District Court order dismissing petitioner's writ.

STATEMENT OF FACTS

Arthur B. Kons, petitioner (hereinafter referred to as the accused) was arrested on his counsin's farm near Stevens Point, Wisconsin by a Minnesota Crime Bureau agent on January 9, 1941 (R. 14, ll. 3, 4). He was incarcerated at the county jail at Stevens Point. The accused at that time requested counsel, a former county attorney from Stevens Point, Mr. Mush Moran (R. 18, ll. 13-21). He was not permitted to call Mr. Moran nor was Mr. Moran contacted by anyone else on the accused's behalf (R. 19, ll. 8-17).

The accused was taken by the Minnesota Crime Bureau agent from Stevens Point, Wisconsin to Red Wing, Minnesota on January 10, 1941. The accused claims he did not waive extradition (R. 25, l. 21). There is no evidence of any extradition proceedings or a waiver of extradition although respondent herein claims the accused came back to Minnesota with the Minnesota Crime Bureau agent voluntarily.

On January 10th or 11th, 1941, the accused requested counsel at Red Wing, Minnesota (R. 23, l. 3). He asked to see Attorney Arntson of Red Wing but was told by the sheriff he would get a lawyer when the right time came (R. 23, l. 3). The accused was not permitted to call Attorney Arntson (R. 24, ll. 10-12).

On January 13, 1941 at 11:00 a. m. the grand jury was called (R. 87, ll. 22-24; R. 88, ll. 1-10). Roll call was taken and they began their deliberation. The county attorney, in seeking an indictment against the accused for mur-

der in the second degree, presented evidence to the grand jury claiming the accused had also been guilty and convicted of arson, larceny and slugging, all of which were unrelated to the matter contained in the instant charge (R. 110; R. 113).

At 2:20 p. m. of the same date (January 13, 1941) the grand jury returned a true bill (R. 88, ll. 14-22). The accused was then brought up from the county jail into the courtroom. The county attorney moved for the arraignment of the accused on the indictment. The accused was not given a copy of the indictment (R. 35, ll. 12-15; Respondent's Exhibit 2). The accused requested counsel and the court instructed the county attorney to have one Mr. Bently "come up at once".

Mr. Bently (the court appointed counsel) talked to the accused for three to four minutes in the courtroom (R. 33, ll. 16-17; R. 35, ll. 16-20). All during this brief conference, the court remained on the bench and no recess was taken (R. 35, ll. 16-20; Respondent's Exhibit 2). This was the first time the accused had met Attorney Bently (R. 32, ll. 23-24). At the time of arraignment and sentencing which immediately followed this brief conference, the accused was not asked any questions by the court or by the county attorney concerning the crime of which he was charged (R. 36, ll. 21-25; Respondent's Exhibit 2). The court appointed counsel did not ask the accused any questions concerning the crime (R. 36, ll. 21-25). After the indictment was read, the court appointed counsel entered a plea of guilty on behalf of the accused, which plea the accused claims not to have authorized (R. 33, ll. 18-20).

The court thereupon sentenced the accused to life imprisonment. He was taken to the county jail. He requested

to see Mr. Bently (R. 37, ll. 21-25) which request was refused (R. 38, ll. 1-4).

The accused was then (that same afternoon of January 13, 1941) taken from Red Wing, Minnesota to Stillwater and committed. The prison dental record shows the accused was received on January 13, 1941 (R. 79, ll. 24-25 through R. 80, ll. 1-4; Petitioner's Exhibit A). The witness, Mr. Farnham (records officer at the state prison) who at the time was employed at the prison in the parole section (R. 75, ll. 11-14) was not certain if the date on the dental record meant the prisoner had been in the dental office on that date or whether the date merely referred to the date on which the prisoner was admitted to the institution (R. 79, ll. 18-22).

The prison dental and hospital section closed about 4:00 p. m. (R. 76, ll. 8-9). The accused says he was seen at the prison hospital the same day he was committed (R. 41, ll. 7-12; R. 42, l. 16).

The accused claims to have been working for his freedom since the day he was committed (R. 64, l. 18 through R. 65, l. 6).

ARGUMENT

I.

Arthur B. Kons, in his conviction of murder in the second degree, was denied the assistance of counsel within the meaning of both the United States Constitution and the Minnesota Constitution.

In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel in his defense, and shall not be held to answer for a criminal offense without

due process of law. *United States Const.* Amend. 14 and *Minn. Const.* Art. I, §§ 6, 7.

The right to counsel cannot be nullified by appointment of counsel who merely furnishes perfunctory or casual representation. The instant case is squarely in point. The law with regard to an accused's right to counsel was succinctly stated by our Minnesota Supreme Court in *State v. Rigg,* 251 Minn. 120, 86 N. W. 2d 723, 724, 726, as follows:

> "Right to assistance of counsel carries with it requirement that consultations with counsel be sufficiently adequate to at least inform the accused of his legal rights. M.S.A. Const. art. 1, §§ 6, 7."
>
> "Purpose of right to counsel is to protect the accused from a conviction resulting from his own ignorance of his legal and constitutional rights; and right to counsel cannot be nullified by appointment of counsel who merely furnishes perfunctory or casual representation. M.S.A. Const. art. 1, §§ 6, 7."
>
> "Accused is entitled to be advised by counsel as to all his legal rights under the law and facts involved, including the right to require State to prove every material allegation of offense charged."

The following facts stand undisputed, undenied by the state, and appear as part of the records in this case independent of any testimony on the part of the accused:

1. The grand jury returned with a true bill at 2:20 p. m. on January 13, 1941.

2. The accused was brought up from the county jail to the courtroom shortly thereafter.

3. The accused was not given a copy of the indictment as far as the transcript shows.

4. The accused requested the assistance of counsel.

5. The trial court selected counsel for the accused and instructed the county attorney to have said court appointed counsel appear before the court at once.

6. The trial court remained on the bench during the period of time that the court appointed counsel conferred with the accused. (The record does not indicate that a recess was taken, however, a series of lines appear in the record between the appointment of counsel and the arraignment. The fact that the court stayed on the bench was testified to by the accused. The county attorney, present at the evidentiary hearings of the habeas corpus proceeding, did not deny that the court remained on the bench as above stated. The clerk of the trial court also testified at the habeas corpus proceedings and did not deny that the trial court stayed on the bench at the time aforesaid.)

7. A conference between the court appointed counsel and the accused lasted only three to four minutes in the courtroom. (This was testified to by Kons, stands undenied by the prosecuting attorney who testified at the habeas corpus proceedings and is undenied by the t[illegible]ourt's clerk who also testified at the habeas cor[illegible]roceedings. Further support is found in the tr[illegible]p. of the proceedings itself.)

8. That the trial court was aware of the brevity of the conference between the court appointed counsel and accused.

9. No questions were asked of the accused relating to any act on his part associating him with the

crime charged at the time of arraignment or sentencing. The court appointed counsel did not ask any questions on that point, the prosecuting attorney asked no questions on that point nor did the court question the accused with reference thereto.

10. The court immediately imposed a life sentence.

11. The accused was taken from Red Wing, Minnesota to the Minnesota State Prison at Stillwater, Minnesota on the same date.

12. That the prison dental records show he was received on January 13, 1941, the same date he was sentenced. (The accused claims that he was examined at the dental office on the afternoon of January 13, 1941. This fact is not denied by the prison records officer who testified that this was possible if the accused had been admitted in time, however, he did not believe that the dental record per se established conclusively that the accused was in fact seen at the dental office on that date.)

13. The prison dental facilities closed shortly before 4:00 p. m.

If the accused was in fact seen at the dental office on the day he was sentenced, one hour and forty minutes would have elapsed totally from the time the grand jury brought in a true bill at Red Wing, Minnesota until he had been incarcerated at the Minnesota State Prison at Stillwater, Minnesota. During this one hour and forty minutes the accused was brought into court, had counsel appointed for him, conferred with counsel, had a plea of

guilty entered by counsel, sentenced, transported from Red Wing to Stillwater, Minnesota and had admitting procedures at Stillwater virtually completed.

In addition to the facts above referred to, the accused's testimony adds the following facts:

1. He requested counsel at the time he was arrested at Stevens Point and was denied the right to call or contact said lawyer.

2. The accused requested counsel upon arrival at Red Wing and was denied the right to contact counsel at Red Wing.

3. There is no record of any extradition proceedings or waiver of extradition proceedings relating to the removal of the accused from Wisconsin to Minnesota. (The state does not claim there were any such proceedings but rather claims that the accused voluntarily returned with the Minnesota Crime Bureau agent, which fact the accused denies.)

4. The accused, when brought into the courtroom and throughout the entire proceedings was handcuffed.

5. The accused at no time authorized the court appointed counsel to enter a plea of guilty to the charge of murder in the second degree.

6. That immediately upon being returned to the county jail following sentencing, the accused asked to see his court appointed counsel for purposes of appeal. The accused was denied his right to see counsel.

7. The only questions asked the accused by his court appointed counsel at the time of the brief con-

ference in the courtroom related to whether or not the accused had any property that he could put up and that at no time did the court appointed counsel discuss with him the nature of the offense or the rights afforded a person charged with the commission of this crime.

It is respectfully urged that under the circumstances of this case, independent of any testimony on the part of Mr. Kons, that it would be impossible for court appointed counsel to have properly advised the accused with respect to the nature of the proof that would be required of the state, the elements of the crime involved, explain to the accused the remedies for failure on the part of the state to extradite him, the fact that he was presumed innocent until proven guilty beyond a reasonable doubt, his right to a trial by jury, his right to the assistance of counsel throughout the course of the trial, his right to investigate the validity of the indictment, his right to appeal. In addition, it would be impossible, within the time allowed, for court appointed counsel to become sufficiently familiar with the facts and circumstances so as to properly advise the accused with respect to entering a plea of any kind.

In *State v. Osgood*, 266 Minn. 315, 123 N. W. 2d 593, the defendant claimed he had only a brief conference with counsel prior to arraignment. The Supreme Court remanded for a further hearing upon the particular facts of the case stating that the right to counsel cannot be nullified by counsel who merely furnishes perfunctory or casual representation and that the *right requires that consultations with counsel be sufficiently adequate* to inform the accused of all his legal rights under the law and facts involved. This case was cited with approval in the case of *State of*

Minnesota v. Waldron, 273 Minn. 57, 139 N. W. 2d 785.

In *State ex rel. Grattan v. Tahash*, 262 Minn. 18, 113 N. W. 2d 342, where counsel had consulted with defendant only thirty minutes the Supreme Court held the representation given him was so inadequate as to be a denial of due process. Other cases dealing with the elements of adequate time are: *State ex rel. Butler v. Swenson*, 243 Minn. 24, 66 N. W. 2d 1; *State ex rel. Bennett v. Rigg*, 259 Minn. 437, 107 N. W. 2d 707; *and State v. Osgood*, 266 Minn. 315, 123 N. W. 2d 593.

In the *Butler* case the Minnesota Supreme Court stated the following rule as to adequate time for preparing a defense:

> "* * * It is also clear that the due process requirements of U. S. Const. Amend. XIV, as well as those of Minn. Const. art. 1, Sec. 7, are satisfied if counsel is appointed *in sufficient time to assure an adequate preparation of the defense*" (emphasis ours).

In that same case the Court stated:

> "* * * A judgment will be held void for want of due process only where the circumstances surrounding the trial are such as to make it a sham and a pretence rather than a real judicial proceeding."

II.

On this record, the trial court did not have jurisdiction to accept a plea of guilty by court appointed counsel on behalf of the accused nor did the trial court have jurisdiction to impose sentence.

As stated in *State v. Rigg, supra,* the right to counsel cannot be nullified by appointment of counsel who merely

furnishes perfunctory or causal representation. The instant case is squarely in point and falls squarely within the line of cases where an accused has been denied the assistance of counsel.

The denial of the assistance of counsel effectively strips the protective mantle of due process of law from the accused. This deprivation of due process terminates the court's jurisdiction and stands as a bar to a valid conviction.

Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A L.R. 357;
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527;
Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969;
Cases cited with approval in *State v. Utecht,* 221 Minn. 145, 21 N. W. 2d 328.

In the cases referred to above, the denial of the assistance of counsel, unless intelligently waived, is a failure to complete the court. The printed record of the proceedings affirmatively establishes that the accused in the instant case did not waive counsel but rather requested counsel. Had the accused waived the assistance of counsel, then counsel would have no authority to enter a plea on behalf of the accused.

In discharging the writ, the Honorable Robert Gillespie attached a memorandum explaining the basis of his order (App. B. p. B-4). He stated that ". . . *Because of the short period of time for consultation there is raised a serious question of whether counsel had sufficient time to adequately advise petitioner of his constitutional rights*" (em-

phasis ours). Later in the memorandum, the court resolves this serious question against the accused because, ". . . *He spent at least nine years in prison and it is fair to assume became (during that time) fully acquainted with a defendant's rights in a criminal case* . . ." (emphasis ours) with the clear inference that nine years in prison qualifies the accused himself as competent counsel on constitutional and criminal law as the same pertains to a charge of murder in the second degree and, therefore, the accused was not entitled to more than the three or four minutes conference with counsel. (The accused having had an 8th grade education—Respondent's Exhibit 2.)

It is of more than passing interest to note the basis upon which the indictment was obtained. The county attorney testified in the habeas corpus proceedings that in order to obtain an indictment against the accused he presented evidence to the grand jury relating to a prior conviction of the accused on a charge of larceny, which crime had no relationship to the charge contained in the indictment. The county attorney further presented evidence to the grand jury of a prior conviction for slugging and arson, also both of which had no bearing on the crime involved in the indictment (R. 112-113). The introduction of this evidence to the grand jury was clearly improper and prejudicial to the rights of the accused under *M.S.A.* 628.59 which reads in part as follows:

> "In the investigation of a charge for the purpose of indictment or presentment, the grand jury shall receive no other evidence than:
>
> (2) Legal, documentary or written evidence.
>
> It shall receive none but legal evidence, and the best in degree to the exclusion of hearsay or secondary

evidence, except when such evidence would be admissible on the trial of the accused for the offense charged. . . ."

Our Minnesota Supreme Court has repeatedly ruled:

". . . that evidence which in any manner tends to show that defendant has committed a crime independent of that for which he is on trial is ordinarily inadmissible."

State v. Martineau, 257 Minn. 334, 101 N. W. 2d 410, 415; *State v. DePauw,* 246 Minn. 91, 74 N. W. 2d 297; *State v. Gavle,* 234 Minn. 186, 48 N. W. 2d 44.

III.

The Minnesota Supreme Court erred in requiring that petitioner not only establish that he was prejudicially denied a constitutional right to the assistance of counsel but in addition therto, require that defendant offer evidence which would cast doubt on his guilt or innocence in the habeas corpus proceeding.

The Minnesota Supreme Court stated, "Unless defendant is denied a constitutional right which is predudicial *and casts doubt on his guilt or innocence,* procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice resulted".

If the Minnesota Supreme Court is correct, then the right of an accused against self-incrimination, the right to remain silent and the right to require that the State prove his guilt or innocence beyond a reasonable doubt would be meaningless. Instead, the accused would have the responsi-

bility of proving his innocence which clearly contravenes the U. S. Constitution and the decisions of this Court referred to infra.

Johnson v. Zerbst, 302 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357;
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527;
Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969.

If the accused was denied the assistance of counsel, the trial court was without jurisdiction. The fact that an invalid conviction resulted does not change the burden of proof in a subsequent proceeding involving the same charge.

CONCLUSION

For the reasons set forth above, petitioner urgently prays that a Writ of Certiorari issue from this Court to review the judgment of the Supreme Court of Minnesota.

Respectfully submitted,

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